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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 220

RST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN

Appellant

v.

ANLEY W. BOWERS (Successor to John W. Peck) TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 220

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN

Appellant

v.

STANLEY W. BOWERS (Successor to John W. Peck) TAX COMMISSIONER OF OHIO

STATEMENT AS TO JURISDICTION

The appellant, First Federal Savings and Loan Association of Warren, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

Statutory Provisions Conferring Jurisdiction

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by Title 28, United States Code, §§1257 (2), (3), 2101 (c), 2103.

Statutes of the State the Validity of Which Is Involved Herein

The statutes of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio as not being repugnant to the Constitution of the

United States are the statutes providing for and relating to assessment of intangible personal property taxes against financial institutions upon account of their deposits and the property representing capital employed by them measured in the case of appellant by its surplus or reserves and undivided profits, particularly, G. C. §§ 5324, 5328-1, 5406, 5407, 5408, 5409, 5410, 5411, 5411-1, 5411-2, 5412, 5412-1, 5638-1, 5673-1 and 5673-2. The pertinent parts of such statutes are quoted in the Appendix. All references are to the General Code applicable to this case—not to the Revised Code of Ohio which has since become effective.

Provisions of the Constitution and Laws of the United States to Which the Statutes of Ohio and the Judgment of the Supreme Court of Ohio Construing Them are Repugnant.

The statutes of Ohio as construed and applied by the judgment of the Supreme Court of Ohio are repugnant to the Constitution of the United States, Article I, Section 8 and Section 1 of the Fourteenth Amendment and to U. S. Code Title 31, Section 742 (R. S. 3701) and Title 12, Section 1433, the pertinent parts of which are quoted in the Appendix.

Date of Judgment and Date of Application for Appeal

The final judgment of the Supreme Court of Ohio which is now sought to be reviewed was dated March 10, 1954 but did not become final for the purpose of appeal until March 31, 1954, when appellant's Application for Rehearing was denied; the petition for appeal was presented herewith within 90 days thereafter as required by Title 28, Section 2101 (c)—i.e. on June 23, 1954.

Nature of Case and Rulings of the Court

The case originated by the timely filing by appellant with the Tax Commissioner of Ohio of an application for certificate of abatement of taxes illegally and erroneously assessed, overpaid and collected for each of the years 1947-1951 against the appellant as a financial institution upon account of its deposits and property representing capital employed, measured by its surplus or reserves and undivided profits. The application was based upon the fact that the taxes so assessed, collected and paid for each of the years included taxes upon United States bonds and stock in the Federal Home Loan Bank (a federal government instrumentality) owned and held by appellant, contrary to the statutes of the United States. This application was denied.

Appellant filed timely notice of appeal to the Board of Tax Appeals of Ohio which, after hearing, reversed the order of the Tax Commissioner in part and ordered the case remanded with instructions to deduct the value of United States bonds and Federal Home Loan Bank stock owned by the appellant in the several years involved from the assessment of property representing capital measured by reserves and undivided profits but denied the deduction from the value of deposits assessed against appellant of any part of such securities, which exceeded in value the reserves and undivided profits.

The Tax Commissioner appealed to the Supreme Court of Ohio from the decision insofar as it allowed deduction from reserves and undivided profits, and exemption in part from taxation, of the value of United States bonds and Federal Home Loan Bank stock.

The Supreme Court of Ohio reversed the order of the Board of Tax Appeals insofar as it permitted the deduction of Federal securities from reserves and undivided profits

or the property represented thereby and exempted the same from taxation in part.

An application for rehearing was filed by appellant and on March 31, 1954, denied. The opinion of the Supreme Court referred to, and was based generally upon, the reasons given in the opinion in *Society for Savings in the City of Cleveland* v. *Peck, Tax Commissioner*, decided on the same day. Society for Savings has no capital stock, and appellant has no capital stock, other than what were formerly known as withdrawable shares and by the tax law G. C. §5324 are defined and taxed as deposits. None of the holders of deposits has any right to withdraw any sum in excess of amounts credited upon his passbook and such sums are generally freely withdrawable.

Withdrawable savings and loan "shares", which are "deposits" under G. C. §5324, are excepted from the assessment of capital stock by G. C. §5408, and there being no capital stock in such cases, the section provides instead for asssessment of the "capital employed or property representing it" in such institutions. By G. C. §5412 the value of the property representing capital employed by such institutions is assessed at the aggregate amount of the capital (none in appellant's case), the surplus or reserve fund and undivided profits. By one clause of G. C. §5638-1 deposits are assessed at two mills on the dollar and by the next clause capital employed by financial institutions is assessed at two mills on the dollar. The taxes involved in this appeal were levied against appellant, measured by the book value of its assets less liabilities without deduction of Federal securities; they were paid by appellant and there is no provision of law whereby it can recover therefor from anyone else.

The state court in its opinion held the tax upon the property representing capital employed by the institution meas-

ured by reserves and undivided profits is a tax upon ownership interests of the owners of the institution and not upon any property of or belonging to such institutions—a tax upon the depositors in spite of the facts (1) that under the preceding clause of the statute (G. C. §5638-1), a tax was assessed upon the amount of the deposits; (2) that the depositors have no enforceable interest in property representing surplus or reserves and undivided profits; (3) that the depositors change from day to day at the rate, in the case of appellant, of one-third of all depositors in a year or a complete turnover of depositors in three years; and (4) the fact that there is no statutory provision for passing on the tax to the depositors and collecting the tax on property representing capital, if indeed it be a tax upon them. This last the court rationalized by saying that in effect the tax is passed on by reducing the assets of the institution available for the payment of dividends or interest upon deposits.

Substantiality of Questions Involved

This case involves the imposition of intangible personal property taxes upon property of a financial institution having no capital stock other than withdrawable shares (which by the tax statutes are defined and classified as deposits) upon a valuation including the full amount of deposits plus reserves and undivided profits without deduction therefrom of the United States bonds and stock in the Federal Home Loan Bank (a federal government instrumentality) which are, by Federal law, exempt from such taxes.

Prior to the enactment of the Federal statutes exempting such securities from state taxation it had been held that such taxation invades the fiscal powers of the Federal Government and is repugnant to the Constitution of the United States, Article I, Section 8.

Because the imposition of state tax upon Federal securi-

ties owned and held by appellant is unlawful and unconstitutional, the statutes construed to permit such imposition deprive appellant of its property without due process of law and deny appellant the equal protection of the laws; they are therefore repugnant also to Section 1 of the Fourteenth Amendment of the Constitution of the United States.

In the majority opinion the Supreme Court of Ohio attempted to circumvent the exemption under the Federal statutes and Constitution by holding that the tax is not, as assessed, against the appellant as a financial institution but is, in fact, imposed upon its depositors—one tax upon the value of the deposits as shown upon the passbooks and an additional tax (with which alone this appeal is concerned) upon the same depositors, upon the property representing surplus or reserves and undivided profits of the institution which the Court defined as an ownership interest of the depositors in the institution, despite the fact that they can never withdraw or realize upon any part of such so-called ownership interest short of the dissolution of the institution which is decidedly improbable unless and until by virtue of bad management or other adversity its assets should be so reduced as to eliminate reserves and undivided profits.

If such were the effect of the law, it would discriminate against depositors in appellant each of whom would thereby be taxed upon the value of his deposit plus a ratable portion of property representing reserves and undivided profits, as compared with depositors in banks and other financial institutions taxed under the same law but having issued permanent stock. In case of the latter, the depositors, under the Court's ruling, would be taxed only upon the value of their deposits as shown in their passbooks. This interpretation of the law imposing discriminatory double taxation upon appellant's depositors as compared with

those of other institutions having permanent capital stock would constitute a denial of the equal protection of the laws.

Furthermore, there is no provision whatever, practicable or otherwise, for the passing on of the tax on the interest of the depositors, if any, in the reserves and undivided profits.

It is not sufficient, as the state court said, that payment by a financial institution of tax against its depositors on their interests (if any they have) in reserves and undivided profits will necessarily reduce, to the extent of the payments made, the funds available for payment of interest on their deposits and that thus the institution "will always be able to reimburse itself" in effect. *Home Savings Bank* v. *Des Moines*, 205 U. S. 503.

It should be obvious that the questions involved are substantial.

With the ever increasing expense of operation of the Federal government, its ever growing financial participation in international activities beyond the borders of the United States and the myriad other requirements of government, the importance of protecting the fiscal powers of the United States becomes ever greater. The ability to finance its requirements by the issue and sale of bonds freely and free from taxation by the states which might diminish in the slightest degree the market value or investment attractiveness of Federal securities, is of the utmost importance. The question is of continuing importance and not limited to the particular years and amount involved herein.

Stage at Which Federal Questions Raised

The Federal questions sought to be reviewed were raised at all stages of the case—

(a) By the following statement in appellant's Claim for Refund and Abatement filed with the Tax Commissioner:

> "The obligations of the United States including the principal and accrued interest on bonds issued upon it and stock of the Federal Home Loan Bank were erroneously and illegally included in the tax base . . . Title 31 U. S. C. § 742; Title 12 U. S. C. § 1433; and *Rosch* v. *First Savings & Loan Association*, 203 S. W. 2d. 1006."

(b) In the appellant's Notice of Appeal to the Board of Tax Appeals as follows:

> "4. The value of United States Government Bonds, including principal and accrued interest thereon and stock of the Federal Home Loan Bank, a federal government instramentality, were erroneously and illegally included in the tax base or formula for assessment of the deposits (or capital), reserves and undivided profits of the Appellant and thereby in legal effect the State of Ohio imposed an illegal tax upon such securities exempted by the provisions of U. S. Code Title 31, Section 742 and Title 12, Section 1433.
>
> "5. The Statutes of Ohio as construed and enforced by the order of the Tax Commissioner and the order of the Tax Commissioner unjustly and illegally discriminate against the Appellant, deprive it of property without due process of law and deny it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States."

(c) In appellant's brief before the Board of Tax Appeals (pp. 4-6) citing, quoting from, and discussing at length: *McCulloch* v. *Maryland*, 4 Wheat. 316; *Wes-*

ton v. *Charleston*, 2 Pet. 449; *Banks* v. *Mayor*, 7 Wall. 16; *Bank of Commerce* v. *New York City*, 2 Black 620, 629; *Bank Tax Case*, 2 Wall 200; Title 31 U. S. C. § 742; Title 12 U. S. C. § 1433; *Bosch* v. *First Savings and Loan Association*, 203 S. W. 2d, 1006; *New Jersey Title Insurance Company* v. *Division of Tax Appeals*, 338 U. S. 665; 70 S. Ct. 413, holding such taxes repugnant to the Constitution and laws of the United States.

(d) The Board of Tax Appeals held the order of the Tax Commissioner erroneous in including in tax base the value of federal securities in assessing the value of the property representing the capital employed by appellant (i. e., its reserves and undivided profits) for the reasons stated in its entry in the case of *Society for Savings in the City of Cleveland* which were referred to and made a part of its entry in this case. We quote

> "Or, the question may be stated in another way, to wit:
>
> > Was the Tax Commissioner in error in including in the tax base the value of federal securities owned by appellant in assessing, pursuant to Section 5412, General Code, the value of 'property representing the capital employed by' appellant (a financial institution), the capital of which financial institution is not divided into shares?"

"The federal Constitutional provision and the federal statutory enactment relied on by appellant read as follows:

> *Constitution of the United States, Article I, Section 8*, Clause 2.
>
> The Congress shall have power * * * To borrow money on the credit of the United States, * * *.
>
> *United States Code, Title 31, Section 742* (Revised Statutes, Section 3701)
>
> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the

United States, shall be exempt from taxation by or under State or municipal or local authority."

* * * * * * *

"However, the decisions of the Supreme Court of the United States leave no room for doubt but that a State tax upon the "capital employed, or the property representing it" (General Code, Section 5408), of a corporation is unconstitutional and violative of the requirement of the federal statute if and to the extent that the value of federal securities is included in the tax base. The cases sustaining the foregoing conclusion of law extend over a long period of years. People vs. Commissioners of Taxes, 2 Black 620 (1863); Bank Tax Case, 2 Wall. 200 (1864); Home Savings Bank vs. Des Moines, 205 U. S. 503 (1906); Farmers and Mechanics Savings Bank vs. Minnesota, 232 U. S. 516 (1914); Missouri vs. Gehner 281 U. S. 313 (1930); New Jersey Realty Title Insurance Company vs. Division of Tax Appeals, 338 U. S. 665 (1950)."

(e) This was recognized in the Tax Commissioner's Notice of Appeal to the Supreme Court of Ohio by the statement:

"2. The Board of Tax Appeals erred in holding that the intangible tax assumed by the appellee was an unconstitutional tax upon its capital invested in United States securities."

and in his brief filed in this and seven other cases in the Supreme Court of Ohio:

(pp. 16-17) "Two of the taxpayers—*Society for Savings* and *First Federal Savings & Loan*—do not have capital divided into shares. In taxing them the Tax Commissioner assessed their deposits as is provided by law, and assessed their surplus, reserves and undivided profits as "the value of the property representing the capital employed * * * not divided into shares." All of the taxpayers say that this

second assessment violates Article I, Section 8, of the United States Constitution which gives Congress the borrowing power, and Title 31, Section 742, United States Code, which exempts federal securities from local taxation. On this point the Board of Tax Appeals agreed with the taxpayers.

"The tax Commissioner concedes, of course that the literal language of Sections 5408 and 5412, General Code, refer to direct assessments of capital. He also agrees with the Board of Tax Appeals that since the cases of *Bank of Commerce* v. *New York City*, 67 U. S. (2 Black) 620, and the *Bank Tax Case*, 69 U. S. (2 Wall.) 200, a state tax upon "capital employed or the property representing it" is bad to the extent that federal securities are included in the tax base."

(f) Appellant's Answer and Reply Brief (p. 2) in the state Supreme Court set forth the following additional question presented by the appeal of the Tax Commissioner:

"2. Whether the statutes of Ohio construed to deny the deduction of Federal securities from the tax base for assessment of capital, surplus, or reserves and undivided profits would not be repugnant to the Constitution of the United States."

(g) In appellant's application for rehearing after announcement of the opinion of the Supreme Court in which a novel and untenable theory not argued by the attorney general at the hearing, was resorted to, by the following:

"The opinion presents an additional basis of unconstitutionality. As construed by the Court, the statutes would impose upon the deposits in each institution two separate taxes, i.e., a tax of two mills on the dollar of the amounts of the deposits and another tax of two mills on the dollar on the amount of the capital employed by the financial institution, that is, upon its sur-

plus, reserves and undivided profits. This is double taxation—two personal property taxes assessed against the same property—and results in depriving the Taxpayer of property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States in *Senior* v. *Braden*, 295 U. S. 422, 55 S. Ct. 800 reversing the decision of this court in 128 O. S. 597 held that the Ohio intangible tax upon investments in land trust certificates representing interests in land which were also subject to real estate taxes was double taxation contrary to the Fourteenth Amendment. The depositors in Society for Savings and in the Taxpayer here are no different from the depositors in banks or savings and loan associations having permanent shares or capital stock yet their deposits, under the decisions announced, would be taxed doubly whereas the depositors in institutions having permanent shares or capital stock would be taxed only upon the withdrawal value of their deposits and this despite the fact that in each case the depositors have the protection of the reserves and undivided profits behind them guarding against any loss. This cannot be justified on the ground that there are two different kinds of property—the deposits on the one hand and the reserves and undivided profits on the other; for their rights are inseparable. So long as the depositor maintains his deposit, he has the protection of the surplus, reserves and undivided profits; but he cannot withdraw his deposit without losing that protection; hence, if there were any ownership interest coupled with the deposit, the two would constitute only one item of property and not two separate items. No value is added by surplus, reserves and un-

divided profits and the additional tax on deposits would be confiscatory."

Cases Supporting Jurisdiction

State taxation of bonds and stock of the United States and of Federal instrumentalities is an invasion of the fiscal powers of the United States under the Constitution, Article I, Section 8 and unconstitutional —*McCulloch* v. *Maryland*, 4 Wheat, 316; *Weston* v. *Charleston*, 2 Pet. 449; *Bank of Commerce* v. *New York City*, 2 Black 620, 629; *Bank Tax Case*, 2 Wall. 200-209; *Banks* v. *The Mayor*, 7 Wall. 16, 24; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *New Jersey Title Insurance Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 70 S. Ct. 413. Likewise such taxation is repugnant to the laws of the United States—*Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *State of Missouri* v. *Gehner*, 281 U. S. 313, 50 S. Ct. 326; *New Jersey Title Insurance Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 70 S. Ct. 413. Shares in the Federal Home Loan Bank, a federal government instrumentality, are exempt from State tax under the Federal statutes, *Roesch* v. *First Savings & Loan Assn.*, 203 S. W. 2d 1006, 1011.

Although the Supreme Court of the United States will generally accept the construction of the state law by the highest court of the state, it will review such a decision where it is unfounded, untenable, without fair or substantial support, essentially arbitrary or a mere device to prevent review of the decision upon the Federal question—*Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, 164; *Ward* v. *County Commissioners*, 253 U. S. 17, 22; *Lawrence* v. *State Tax Com.*, 286 U. S. 276, 282, 52 S. Ct. 556. A strained construction, not warranted by language of the statute cannot be sustained in order to make the law conform to a constitutional limitation—*Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518-519; 46 S. Ct. 619, 623.

The Supreme Court is never bound by the state's characterization or determination of the incidence of the state tax or the form in which the taxing scheme is cast but will determine for itself the real nature, operation, substance and practical effect of the tax where the constitutionality of the tax is in question—*United States, et al* v. *Allegheny County*, 322 U. S. 174, 184; 64 S. Ct. 908, 914; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362; *Carpenter* v. *Shaw*, 280 U. S. 363, 367; 50 S. Ct. 121, 123; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 83; 67 S. Ct. 156, 164; *Senior* v. *Braden*, 295 U. S. 422, 430; 55 S. Ct. 800, 802; *N. J. Title Insurance Company* v. *Division of Tax Appeals*, 338 U. S. 665, 673, 70 S. Ct. 413, 417.

A state tax which purports to be a tax on the depositors or shareholders in a financial institution but is required to be paid by the latter without provision for recovery from the depositors is a tax against the institution itself upon its property, *Home Savings Bank* v. *Des Moines*, 205 U. S. 503.

The double imposition of property tax upon the same property is repugnant to the Fourteenth Amendment, *Senior* v. *Braden*, 295 U. S. 422, 430; 55 S. Ct. 800, 802.

Since the Board of Tax Appeals had eliminated or exempted United States bonds and Federal Home Loan Bank stock from the tax base and the Supreme Court on appeal for the first time so construed the statutes as to permit double taxation of appellant's depositors the raising of the question of unconstitutionality on that ground for the first time by application for rehearing was timely—*State of Missouri* v. *Gehner*, 281 U. S. 313, 320; 50 S. Ct. 326, 327; *Saunders* v. *Shaw*, 244 U. S. 317, 320.

Where a timely application for rehearing has been filed, as here, the finality necessary for review by the Supreme Court is deferred until the application is denied or until the

power to act upon it has expired—*Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164, 166.

A federal question created by an unexpected decision of the highest state Court is timely raised where presented in an application for rehearing even though the application is summarily denied without reference to the federal question. *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-367, 53 S. Ct. 145, 149; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-678.

Opinions Below

The opinions in the court below are officially reported in 161 O. S. 194 and unofficially in 118 N. E. (2d) 667 and 53 O. O. 66. The majority (per curiam) opinion refers to and relies generally upon the majority opinion in *Society for Savings in the City of Cleveland* v. *Peck, Tax Commissioner*, which is officially reported in 161 O. S. 123 and unofficially in 118 N. E. (2d) 651 and 53 O. O. 53. All of such opinions are copied in the Appendix hereto.*

*(CLERK'S NOTE: The opinion in the case of *Society for Savings, etc.*, v. *Peck* is printed as an Appendix to the Statement as to Jurisdiction in No. 204 and is not printed here.)

Conclusion

WHEREFORE the appellant First Federal Savings and Loan Association of Warren respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal; and that if the appeal should be considered as having been improvidently taken the Court should consider it as a petition for certiorari; all for the reasons stated herein and prays that the final judgment of the Supreme Court of Ohio be reversed and for such other relief as may be fit and proper.

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APPENDIX

Opinions of the Supreme Court of Ohio

First Federal Savings and Loan Association of Warren v. Peck, Tax Commissioner, 161 O. S. 149 (Nos. 33524 and 33525—Decided March 10, 1954.) Appeals from the Board of Tax Appeals.

The First Federal Savings & Loan Association of Warren, herein referred to as applicant, is incorporated under federal statutes and has only withdrawable shares.

It filed with the Tax Commissioner an application pursuant to subdivision 2 of Section 1464-3, General Code, for a certificate of abatement for alleged overpayment of taxes assessed pursuant to Sections 5406 to 5414, General Code, and levied pursuant to Section 5638-1, General Code (1) on "the amount of its deposits" (its withdrawable shares being defined by Section 5324, General Code, as deposits) and (2) on "the capital employed, or the property representing it, in" that instituiton.

It appeared that, if the amount of federal securities and the value of federal home bank stock owned by the applicant were deducted from the amount of its total assets, the remaining amount would be less than the amount of its withdrawable shares or deposits. The applicant claimed that the Tax Commissioner should not have taxed withdrawable shares of the institution as deposits at more than that remaining amount and should not have assessed any tax on "the capital employed, or the property representing it, in" the institution.

This application was denied by the Tax Commissioner. On appeal to the Board of Tax Appeals, the order of the Tax Commissioner was affirmed only so far as it related to taxes on the shares as deposits, and the Tax Commissioner was directed to issue the certificate of abatement requested so far as it related to taxes assessed on "the capital employed, or the property representing it, in" the institution.

In case No. 33524, the applicant has appealed to this court from that part of the decision of the Board of Tax Appeals which affirmed the order of the Tax Commissioner. In case

No. 33525, the Tax Commissioner has appealed to this court from that portion of the decision of the Board of Tax Appeals which reversed the order of the Tax Commissioner.

Per Curiam. For the reasons which we gave in support of our judgment in *Society for Savings in City of Cleveland v. Peck, Tax Commr., ante,* 122, we are of the opinion that the taxes involved in the instant cases, so far as they relate to "the surplus or reserve fund and the undivided profits" of the corporation, are taxes on the intangible property interests of the owners of the corporation representing their capital employed in the corporation, and those taxes are not taxes on the corporation or on the capital or the assets of the corporation. See also last sentence of Section 5412, General Code, and discussion thereof in *Society for Savings v. Peck, Tax Commr., supra.*

So far as the taxes involved in the instant cases relate to taxes on the withdrawable shares of the corporation as deposits, such taxes are clearly taxes levied against the owners of the deposits. See Sections 5406, 5324, 5412, 5412-1, 5638-1, 5673-1 and 5673-2, General Code.

In addition, the First Federal Savings & Loan Association of Warren has argued that its shares are exempt from taxation by reason of the provisions of Section 5323, General Code, reading:

"The term 'investments' as used in this Title, includes the following:

"Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by the act of the Congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by Chapter four of this Title, and (3) such as are defined in this Chapter as 'deposits.' "

It is contended by the corporation that it comes within the first numbered exception. But see 12 U. S. Code, Section 1464h. However, it definitely is described by the words in the second numbered exception which read, "financial

institutions * * * as defined by Chapter Four of this Title [including Sections 5406 to 5414, General Code]." Likewise, Section 5324, which is in the Chapter in which Section 5323 appears, defines withdrawable shares, such as those of this corporation, as "deposits." Section 5406 does refer to Section 5324, General Code. Otherwise there is nothing in the assessment sections here involved (Sections 5406 to 5414, inclusive, General Code) which do refer to the Chapter in which Section 5323 is found. As held in *Broadview Savings & Loan Co. v. Peck, Tax Commr., ante*, 119, the provisions of Section 5323, General Code, are not to be read *in pari materia* with Sections 5406 to 5414, inclusive, General Code. Nothing in those sections justifies any reference to the exception relied upon by applicant in Section 5323, General Code.

Finally, it is argued that, since such a tax cannot be imposed on the owners of an unincorporated financial institution without deducting federal securities in the computation of the tax, such a deduction must also be made in computing the tax where, as here, an incorporated financial institution carrying on the same line of business is involved. We believe that the decision and the reasoning of the Supreme Court of the United States in *Des Moines National Bank v. Fairweather, Mayor*, 263 U. S. 103, 68 L. Ed. 191, 44 S. Ct. 23, is a complete answer to any such argument.

The decision of the Board of Tax Appeals so far as it relates to case No. 33524 is affirmed and so far as it relates to case No. 33525 is reversed.

Judgment accordingly.

Weygandt, C. J.; Middleton, Taft, Hart, Zimmerman and Lamneck, JJ., concur.

Stewart, *J.*:

Concurs so far as the decision of the Board of Tax Appeals is affirmed and dissents so far as such decision is reversed.

Provisions of the Constitution and Statutes of the United States

Constitution—Article I, Section 8

"To borrow Money on the credit of the United States;"

Constitution—Fourteenth Amendment, Section 1

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code—Title 31, Section 742

"*Exemption from taxation.* Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. (R. S. § 3701.)"

United States Code—Title 12, Section 1433

"*Exemption from taxation; obligation acceptable as credit on debt of home owner.*

"Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent

according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank. July 22, 1932, c. 522, § 13, 47 Stat. 735; May 28, 1935, c. 150, § 8, 49 Stat. 295."

General Code of Ohio

§ 5324 "*'Deposits' defined.* The term 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable." (114 O. L. 714, 716, Section 1)

§ 5328-1 "*Property to be entered on classified tax list and duplicate; exemption.*

"All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title * * *. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

"A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock." (120 O. L. 112, 113)

§ 5406 "*Deposits required to be returned by financial institutions; exceptions.*

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as

defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipality corporation, school district, township, or other subdivision thereof, or to any other financial institution or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited." (124 O. L. 156, § 1)

§ 5407 "[*'Financial institution' defined.*] The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state, and engages in the business of receiving deposits, and of lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. * * *" (114 O. L. 714, 747, § 3)

§ 5408 "[*Taxable property of financial institution, how listed, assessed and taxed.*] All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section

5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter." (115 O. L. 571, §1)

§5409 "*Real Estate of financial institution, how and where taxed.*

The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution." (114 O. L. 714, 747, §3)

§5410 "[*Record of names and residence of stockholders and shares of each; inspection.*]

"There shall be kept in the offices at all times where the business of such financial institution is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment." (114 O. L. 714, 748, §3)

§5411 "*Annual report of resources and liabilities of banks financial institutions.*

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager, or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appro-

priate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding." (124 O. L. 449, 452, §3)

§5411-1. "[*Day for listing and assessing taxable deposits fixed by commission; notice of action.*] On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby." (114 O. L. 714, 748, §3)

§5411-2 "*Report of financial institution; contents.* The report of each financial institution made pursuant to section 5411 of the General Code shall also show the aggregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed." (122 O. L. 375, §1)

§5412 *"Tax commissioner to ascertain and assess all taxable shares and capital of financial institution; depositors to be assessed, when.*

"Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown." (122 O. L. 375, 376, §1)

§5412-1 *"Certification of assessment of financial institution to auditor of state; certification of assessment of depositors to county auditors; amounts placed on tax lists; certificate of abatement.*

"On or before the first Monday of May, annually, the tax commissioner shall certify to the auditor of state the assessment of each financial institution located in the state, showing separately the county in which the institution's principal office is located, and the amount or amounts of taxable deposits, if any, of branches in each county other than that in which such principal office is located, and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount or amounts so

certified on the intangible property tax list in his office. The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

"Any certificate of abatement issued pursuant to section 1464-3 of the General Code for the overpayment of the deposits tax or taxes imposed on shares of financial institutions or on capital employed by financial institutions may be tendered by the payee or transferee thereof to the treasurer of state as payment for any taxes allocable to the county in which the claim for overpayment arose." (124 O. L. 64, 66)

§5638-1 "*Tax levy on property on intangible property tax list; rates.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to-wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *." (120 O. L. 115, 117, §1)

§5673-1 "[*Taxes a lien on deposits and shares of stock of financial institution; payment.*]

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every

day of delay in the payment of such taxes." (115 O. L. 595, §1)

§5673-2 *"Financial institution may deduct taxes from deposits, interests or dividends, how and when; lien; enforcement of lien.*

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter became due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer." (115 O. L. 595, §1)